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No. 439

In the Supreme Court of the United States

October Term, 1936

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case. The petition is based upon the same facts, involving identical issues, as *Ogle* v. *Helvering*, 77 F. (2d) 338 (C. C. A. 2d), now on petition for a writ of certiorari, No. 137, October Term, 1935, to which petition we made no opposition.

On May 28, 1928, petitioner sold 962⅔ shares of stock of the Minneapolis Gas Light Company for $439,261.05. (R. 33.)

These shares were distributed to him pursuant to a decree of distribution from the estate of Alonzo

T. Rand, who died intestate October 31, 1925. (R. 33–34.)

The shares had a fair market value of $169,419.33, as of the date of distribution, January 28, 1927, so that the profit realized from the sale was $269,-841.72. (R. 33.)

The petitioner reported this profit as a capital net gain taxable at the 12½ percent rate.

The Commissioner of Internal Revenue held that the profit was taxable at the ordinary rates. The sale was less than two years from the date of distribution of the stock. The Commissioner held that the date of distribution, rather than the date of the death of Alonzo T. Rand, controlled in determining whether the property had been "held by the taxpayer for more than two years" and whether there was a capital net gain.

If Commissioner's contention is correct, the deficiency in petitioner's income tax for the calendar year 1928 is $20,736.45 (R. 34); if incorrect, petitioner has made an overpayment of income tax for the calendar year 1928 in the amount of $13,-545.09. (R. 33.)

The Board of Tax Appeals sustained the Commissioner's holding that there was no capital net gain, and determined a deficiency of $20,736.45. (R. 17.) Its decision was affirmed by the court below.

While we think the conclusion reached below is correct, we do not feel that the petition should be opposed. The court below considered that its de-

cision was in conflict with the decisions of the Circuit Court of Appeals for the First Circuit in *First Nat. Bank of Boston* v. *United States*, 76 F. (2d) 200, and *Lee* v. *Commissioner*, 76 F. (2d) 203. The Government has filed petitions for writs of certiorari in those cases, Nos. 110 and 111, October term, 1935, alleging a conflict with the decision in the case of *Ogle* v. *Helvering, supra.* In those cases, the taxpayers were residuary legatees, whereas in this case, and in *Ogle* v. *Helvering*, the taxpayer took under intestacy laws; but the question presented in all four cases is whether personal property of a decedent passing otherwise than by specific bequest may be considered to have been held by the recipient during any period prior to actual distribution for the purpose of satisfying the two-year requirement of Section 101 (c) (8) of the Revenue Act of 1928.

Writ of certiorari was granted by the Court May 20, 1935, in the case of *Nancy K. McFeely* v. *Helvering*, No. 24, October Term, 1935. That case also presents the same general question, although the facts are different in that the taxpayer was the donee of a widow who had elected under the laws of Pennsylvania to take against the will of her deceased husband. The court in that case held that the date of distribution controlled. To the same effect is *Dibblee* v. *Commissioner*, 75 F. (2d) 617 (C. C. A. 9th), now pending on the taxpayer's petition for rehearing.

We believe that the question involved is of sufficient importance to justify the granting of the writ.

Respectfully submitted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1935.

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